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AUG 27 2007

OFFICE OF PETITIONS

In re Application of :  
Klug : DECISION ON PETITION  
Application No. 09/826,227 :  
For: April 4, 2001 :  
Atty. Dkt. No.: P-1030 :

This is a decision on the petition under 37 CFR 1.137(a), July 5, 2007, to revive the above-identified application.

The petition under 37 CFR 1.137(a) is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within **TWO (2) MONTHS** from mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is not a final agency decision.

This application became abandoned December 9, 2004 for failure to timely submit a proper reply to the Notice of Allowance and Issue Fee Due (Notice) mailed September 8, 2004. The Notice set a three month statutory period of time for reply. Notice of Abandonment was mailed January 20, 2005.

A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(1); (3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c).

The instant petition fails to satisfy requirement (3) set forth above.

Petitioner has failed to present a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable.

The Office may revive an abandoned application if the delay in responding to the relevant outstanding Office requirement is shown to the satisfaction of the Director to have been "unavoidable." See, 37 CFR 1.137(a)(3). Decisions on reviving abandoned applications have adopted the reasonably prudent person standard in determining if the delay was unavoidable. Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (Comm'r Pat. 1887) (the term "unavoidable" "is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business"); In re Mattullath, 38 App. D.C. 497, 514-15 (D.C. Cir. 1912); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (Comm'r Pat. 1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). A petition to revive an application as unavoidably abandoned cannot be granted where petitioner has failed to meet his or her burden of establishing the cause of the unavoidable delay. Haines v. Quigg, 673 F. Supp. 314, 5 USPQ2d 1130 (N.D. Ind. 1987).

Petitioner attributes the failure to reply to the Notice to the Office's failure to mail the Notice to the correct correspondence address. Petitioner argues that a change of correspondence address was filed April 21, 2003, prior to the mailing of the Notice. As a result of a change in correspondence address, the Notice apparently was not received, a response to the Notice was not timely submitted, and, resultantly, the application became abandoned.

Where an application becomes abandoned as a consequence of a change of correspondence address (the Office action being mailed to the old, uncorrected address and failing to reach the applicant in sufficient time to permit a timely reply) an adequate showing of "unavoidable" delay will require a showing that due care was taken to adhere to the requirement for prompt notification in each concerned application of the change of address (see MPEP § 601.03), and must include an adequate showing that a timely notification of the change of address was filed in the application concerned, and in a manner reasonably calculated to call attention to the fact that it was a notification of a change of address. See, MPEP 711.03(c).

A review of the record reveals that a change of correspondence address was received April 21, 2003. The change of correspondence address, however, was not entered because it was not signed by one duly authorized to represent applicant. Paul Chirgott signed the change of correspondence address. A review of the record does not reveal that a power of attorney to Mr. Chirgott was ever filed in the instant application.

The Office is without authority to enter into the record a change of correspondence address submitted by one not empowered to represent the applicant. See, 37 CFR 1.33(a)(2) and 1.33(b)(1).

The change of correspondence address submitted September 1, 2005 was properly executed by James R. Cartiglia in accordance with 37 CFR 1.33(a)(2) and 1.33(b)(1) and was, therefore, entered into the record.

Any renewed petition must establish that the entire period of time from the time that a reply to the Office communication was due until the filing of a grantable petition was unavoidable.

#### **ALTERNATE VENUE**

Petitioner may wish to consider filing a petition stating that the entire delay was unintentional. Petitioners' attention is directed to 37 CFR 1.137(b) which provides for the revival of an "unintentionally" abandoned application without a showing that the delay in prosecution or in late payment of an issue fee was "unavoidable". An "unintentional" petition under 37 CFR 1.137(b) must be accompanied by the required petition fee and reply.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed and therefore must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).

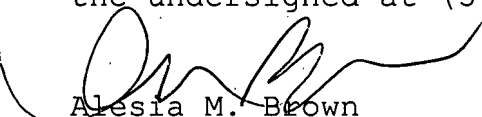
Further correspondence with respect to this matter should be addressed as follows:

By mail:                      Mail Stop Petition  
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Telephone inquiries concerning this matter may be directed to the undersigned at (571) 272-3205.



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